

Joseph R. Saveri (State Bar No. 130064)
Steven N. Williams (State Bar No. 175489)
Nicomedes Sy Herrera (State Bar No. 275332)
Kevin Rayhill (State Bar No. 267496)
Anupama K. Reddy (State Bar No. 324873)
JOSEPH SAVERI LAW FIRM, INC.
601 California Street, Suite 1000
San Francisco, California 94108
Telephone: (415) 500-6800
Facsimile: (415) 395-9940
Email: jsaveri@saverilawfirm.com
swilliams@saverilawfirm.com
nherrera@saverilawfirm.com
krayhill@saverilawfirm.com
asatyasai@saverilawfirm.com

Attorneys for Plaintiff-Relator Zachary Silbersher

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

UNITED STATES OF AMERICA; STATES
OF CALIFORNIA, COLORADO,
CONNECTICUT, DELAWARE, FLORIDA,
GEORGIA, HAWAII, ILLINOIS, INDIANA,
IOWA, LOUISIANA, MICHIGAN,
MINNESOTA, MONTANA, NEVADA,
NEW JERSEY, NEW MEXICO, NEW
YORK, NORTH CAROLINA, OKLAHOMA,
RHODE ISLAND, TENNESSEE, TEXAS,
VERMONT, AND WASHINGTON; THE
COMMONWEALTHS OF
MASSACHUSETTS AND VIRGINIA; AND
THE DISTRICT OF COLUMBIA,

ex rel. ZACHARY SILBERSHER,

Plaintiffs,

v.

JANSSEN BIOTECH, INC., JANSSEN
ONCOLOGY, INC., JANSSEN RESEARCH
& DEVELOPMENT, LLC, and JOHNSON &
JOHNSON,

Defendants.

Case No.3:17-cv-07250-JST

**PLAINTIFF-RELATOR'S RESPONSE
TO DEFENDANTS' REQUEST FOR
JUDICIAL NOTICE (DKT. 33)**

Judge: Hon. Jon S. Tigar

Date: May 16, 2019

Time: 2:00 p.m.

Place: Courtroom 9, 19th Floor, Phillip
Burton Federal Building

1 Plaintiff-Relator Zachary Silbersher (“Relator”) does not oppose Defendants’ request to take
2 judicial notice of the documents attached as Exhibits A through HH to their motion (the “RJN”) for the
3 limited purpose of establishing that those documents existed in the places cited by Defendants at the
4 times indicated.

5 Relator agrees that the Court should “take judicial notice . . . for purposes of showing the
6 existence of the Exhibits and their date of publication.” (RJN, at 7) The Court should not take judicial
7 notice of the truth of any statement contained in those documents. Indeed, Relator alleges that some of
8 the statements in those documents constitute fraudulent misrepresentations, as alleged in the Amended
9 Complaint. (Dkt. 7)

10 The Court also should not take judicial notice of Exhibits A through HH for the purpose of
11 establishing what Relator or the general public “knew about the status” of Zytiga’s commercial success
12 or efficacy compared with competing treatments. *See, e.g., Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d
13 988, 1000 (9th Cir. 2018) (the district court would have “abused its discretion” to take judicial notice of
14 an investors’ call transcript filed with the SEC “to determine what the investors knew about the status”
15 of the study discussed).

16 Moreover, as explained in Relator’s opposition brief, the False Claims Act, 31 U.S.C. §§ 3729-
17 3733, bars *qui tam* actions only if the material allegations of fraud were disclosed in specifically
18 enumerated public *fora* such that the disclosure is “sufficient to enable it adequately to investigate the
19 case and to make a decision whether to prosecute.” *U.S. ex rel. Found. Aiding the Elderly v. Horizon W.*,
20 265 F.3d 1011, 1016, *opinion amended*, 275 F.3d 1189 (9th Cir. 2001). To qualify as a public disclosure, it
21 must be made in: (i) a federal criminal, civil, or administrative hearing or proceeding “in which the
22 Government or agent is a party”; (ii) a Congressional or federal report, hearing, audit or investigation;
23 or (iii) the news media. 31 U.S.C. § 3730(e)(4)(A)(i)-(iii). Relator does not concede that the documents
24 for which defendants ask the Court to take judicial notice are within the three enumerated statutory *fora*
25 under 31 U.S.C § 3730(e)(4)(A).

26 Finally, Relator disagrees with Defendants’ interpretation and characterization of the contents of
27 the documents. The contents of the documents do not disclose the material allegations of fraud that
28

1 Relator alleges in the Complaint.

2
3 Dated: March 27, 2019

JOSEPH SAVERI LAW FIRM, INC.

4 By: /s/ Joseph R. Saveri

Joseph R. Saveri

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